

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & CO.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
FIFTH AND MITCHELL STREET,	:	
CORP., et al.,	:	
Defendants	:	NO. 96-5973

MEMORANDUM AND ORDER

McLaughlin, J.

July 1, 2005

The Court decides here an apparent issue of first impression: Whether there is a right to a jury trial for claims for response costs and property damage under the Pennsylvania Hazardous Sites Clean-Up Act ("HSCA"), 35 P.S. §6020.101 et seq., and the Pennsylvania Storage Tank and Spill Prevention Act ("Storage Tank Act"), 35 P.S. §6021.101 et seq. The Court finds no right to a jury trial under HSCA because the damages it allows to private parties for response costs and contribution are primarily equitable in nature. The Court, however, does find a right to a jury trial under the Storage Tank Act, which has been interpreted by the Pennsylvania Supreme Court to allow the award of compensatory damages.

Plaintiff F.P. Woll & Company ("Woll") brought this suit in 1996 to recover the costs of abating chemical contamination on property it owns in Lansdale, Pennsylvania, as

well as damages for the alleged reduction in the property's value. The plaintiff's initial complaint named over a dozen defendants, but the intervening nine years of litigation have left only three: the prior owners of the property, defendants Fifth and Mitchell Street Corporation and Fifth and Mitchell Street Company (collectively "Fifth and Mitchell"), and a previous tenant on the property, defendant Eaton Laboratories, Inc. ("Eaton").

The plaintiff's remaining claims in this case are for contribution and response costs from all three defendants under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607, 9613(f); for response costs and property damage from all three defendants under HSCA; and for response costs and property damage against Eaton under the Storage Tank Act. There is also a counterclaim by the Fifth and Mitchell defendants for contribution under CERCLA and HSCA and for "common law contribution."

The plaintiff timely requested a jury trial on all of its claims, and the defendants have now moved to strike the jury demand.¹ The plaintiff has conceded in its opposition that,

¹Defendant Eaton Laboratories, Inc. first questioned plaintiff's right to a jury trial in its Pre-Trial Brief (Docket No. 284). By Order dated March 21, 2005 (Docket No. 286), the Court requested supplemental briefing on the issue. Additional briefs were filed by the Fifth and Mitchell defendants (Docket No. 289) and Eaton (Docket No. 291) in support of striking the jury demand and by plaintiff Woll in opposition (Docket No. 288).

under Third Circuit precedent, it is not entitled to a jury on its CERCLA claims for contribution and response costs. See Hatco Corp. v. W.R. Grace & Co.-Conn., 59 F.3d 400 (1995) (CERCLA § 9607 cost recovery claims and § 9613 contribution claims are equitable in nature and not entitled to a jury trial). The issue remaining before the Court is whether the plaintiff is entitled to a jury on its HSCA and Storage Tank Act claims.

A party is entitled to a jury trial in a civil action where either the Seventh Amendment or a statute provides such a right. Tull v. United States, 481 U.S. 412, 417 (1987). The Seventh Amendment provides "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . ."

Because constitutional questions are to be avoided where possible, where a plaintiff's claim is statutory, a court must first analyze the statute to determine whether it can be construed as granting a right to a jury trial. Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 345 (1978); Tull, 481 U.S. at 417 n.3. Only if the statute reveals no legislative intent to grant a jury trial should a court turn to a Seventh Amendment analysis. Feltner; Tull.

To determine whether the Seventh Amendment requires a jury trial on a particular statutory claim, the Supreme Court has set out a two-part analysis.

First, a court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity" and determine whether the action at issue would have been tried to a jury in 1791 (when the Seventh Amendment was adopted) or is analogous to one that was. Wooddell v. Int'l Brotherhood of Elec. Workers Local 71, 502 U.S. 93, 97 (1991), citing Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 565 (1990); Markman v. Westview Instruments, Inc., 517 U.S. 370, 376 (1996). In making this historical inquiry, the Supreme Court has looked to case law and treatises of the period. See Granfinanciera S.A. v. Nordberg, 492 U.S. 33, 43 (1989) (citing 17th Century English caselaw); Chauffeurs, 494 U.S. at 566 (citing J. Story, Commentaries on Equity Jurisprudence).

Second, a court must "examine the remedy sought and determine whether it is legal or equitable in nature." Toll, 481 U.S. at 417-18. The Supreme Court has often characterized this second part of the analysis as more important than the first. See Granfinanciera, 492 U.S. at 42.

I. The Right to a Jury Trial Under HSCA

HSCA is the Pennsylvania counterpart to CERCLA, enacted to "'comprehensively address the problem of hazardous substance releases in this Commonwealth, whether or not these sites qualify

for cleanup under [CERCLA].'" Redland Soccer Club, Inc. v. Dept. of the Army, 696 A.2d 137, 141, 548 Pa. 178, 187 (1997), quoting 35 P.S. § 6020.102(8).

To determine whether the plaintiff is entitled to a jury trial on its HSCA claims, the Court must first determine the scope of that claim and the damages available. Neither the Pennsylvania Supreme Court nor the United States Court of Appeals for the Third Circuit has yet addressed whether HSCA provides a private right of action, but the overwhelming majority of courts to consider the issue have held that it does.² No party here has disputed that HSCA provides a private right of action, and the Court will assume such a right exists. The plaintiff has not identified any specific sections of HSCA as the basis for its claim. Those courts finding a private right of action in HSCA, have grounded that right on HSCA sections 6020.1101 and 6020.702.³

Section 6020.1101 provides that "a release of hazardous substance or a violation of a provision, regulation, order or

²See Bethlehem Iron Works, Inc. v. Lewis Industries, Inc., 891 F. Supp. 221, 225 (E.D. Pa. 1995); Tri-County Business Campus Joint Venture v. Clow Corp., 792 F. Supp. 984, 994 (E.D. Pa. 1992); Toole v. Gould, Inc., 764 F. Supp. 985 (M.D. Pa. 1991); General Elec. Envtl. Servs., Inc. v. Envirotech Corp., 763 F. Supp. 113 (M.D. Pa. 1991); Smith v. Weaver, 445 Pa. Super. 461, 472, 665 A.2d 1215, 1220 (1995); but see Lutz v. Chromatex, Inc., 730 F. Supp. 1328 (M.D. Pa. 1990).

³Bethlehem, 891 F. Supp. at 225; Toole, 764 F. Supp. at 996-97; General Elec., 763 F. Supp. at 115.

response approved by the department under this act shall constitute a public nuisance" and "[a]ny person allowing such a release or committing such a violation shall be liable for the response costs caused by the release or the violation." Id. Section 6020.702 specifies the "Scope of liability" of persons found responsible under the act and provides that a "person who is responsible for a release or threatened release of a hazardous substance . . . is strictly liable" for five categories of "response costs and damages." Id. In addition, a separate section of HSCA specifically authorizes an action for contribution. 35 P.S. § 6020.705(a).

The HSCA sections that authorize a private right of action do not allow the recovery of all the damages requested by the plaintiff. In its HSCA claim, the plaintiff seeks both contribution and indemnification for past and future response costs, as well as compensatory damages for the diminution of the value of its property. Second Amended Complaint (Docket No. 97) at 19; Plaintiff's Memorandum of Law (Docket No. 288) at 2. HSCA, however, does not allow the award of compensatory damages to private parties. Of the five categories of damages authorized by HSCA § 6020.702(a), three are available only to government entities.⁴

⁴HSCA §§ 6020.702(a)(1) and (2) allow the recovery of interim response costs incurred by the Pennsylvania Department of Environmental Resources and "reasonable and necessary or

The remaining two categories of damages available to private parties authorize recovery of the "cost of a health assessment or health effects study," not at issue here, and "[o]ther reasonable and necessary or appropriate costs of response incurred by any other person." HSCA § 6020.702(a)(2),(5). Under HSCA § 6020.702, therefore, a private party like the plaintiff may recover "reasonable and necessary or appropriate" response costs, but is not authorized to recover compensatory damages, including lost property value. The comparable provisions of CERCLA have similarly been interpreted as not allowing recovery for economic losses. Artesian Water Co. v. New Castle County, 659 F.Supp. 1269, 1285-88 (D. Del.1987), aff'd, 851 F.2d 643 (3d Cir.1988).⁵

appropriate" response costs incurred by "the United States, the Commonwealth or a political subdivision." HSCA §§ 6020.702(a)(4) allows recovery of damages "for injury to, destruction of or loss of natural resources within this Commonwealth or belonging to, managed by, controlled by or appertaining to the United States, the Commonwealth, or a political subdivision." The statutory definition of "natural resources" limits recovery under section 6020.702(a)(4) to government entities. "Natural resources" under HSCA are defined as land, air, water, wildlife or other resources "belonging to, managed by, held in trust by, appertaining to or otherwise controlled by the United States, the Commonwealth or a political subdivision." HSCA § 6020.103.

⁵The plaintiff argues that it is entitled to compensatory damages under HSCA because section 6020.702 allows the award of "damages." Pl. Mem. of Law at 3. This argument misquotes the statute. As discussed above, section 6020.702 does not authorize "damages" but instead allows "the following response costs or damages," which the section then specifies by setting out the five categories discussed above.

Having determined that the plaintiff's HSCA claim allows the recovery of response costs and contribution, but not compensatory damages, the Court can now analyze whether the plaintiff is entitled to a jury trial on those claims.

Turning first to the language of the statute itself, neither HSCA's text nor its legislative history reveal any legislative intent regarding a right to a jury trial. In analyzing whether a statute speaks to a right to a jury, the United States Supreme Court has looked to whether the statute expressly grants a right to a jury trial, whether the sections that authorize damages address who should award them, and whether the legislative history refers to an intent to grant a jury trial. See Feltner, 523 U.S. at 345-46 (discussing damage provisions in the Copyright Act); Tull, 481 U.S. at 417 n.3 (referring to the statutory language and legislative history of the Clean Water Act). Here, HSCA does not mention a right to a jury trial and in several places appears specifically to contemplate equitable relief. See HSCA § 6020.507(a) (granting the state Department of Environmental Regulation, state agencies, and municipalities the right to bring an "action in equity" to "abate a public nuisance" or recover "response costs and natural resource damages"); HSCA § 6020.705(b) (providing that "the court . . . shall enter judgment allocating liability" for contribution

claims). HSCA's sparse legislative history is also silent about a right to a trial by jury.

As the statute itself fails to resolve whether the plaintiff is entitled to a jury, the Court must reach the constitutional question. The Court finds the constitutional analysis here is controlled by Hatco Corp. v. W.R. Grace & Co.-Conn., 59 F.3d 400 (1995).

In Hatco, the United States Court of Appeals for the Third Circuit considered whether CERCLA claims for response costs (CERCLA § 9607) and contribution (CERCLA § 9613(f)) were entitled to a jury trial under the Seventh Amendment. The Hatco court found that a CERCLA claim for response costs was not entitled to a jury trial, adopting the reasoning of United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 749 (8th Cir. 1987). The Hatco court, following Northeastern, held that damages for response costs sought "restitution of amounts that [a party] had expended" and therefore sought "a form of equitable relief." Hatco at 412. As a consequence, a claim for response costs was not entitled to a jury trial under the Seventh Amendment.

The Hatco court reached a similar conclusion about the right to contribution under CERCLA after conducting a lengthier analysis. The court first determined that CERCLA showed no evidence of any legislative intent to grant a jury trial. Id.

at 412. The court then reviewed the historical treatment of contribution claims in the 18th century to determine whether they were actions in law or equity. Based on Justice Story's Commentaries on Equity Jurisprudence and other treatises, the court held that contribution claims, while sometimes available at law, were predominantly viewed as equitable at the time the Bill of Rights was adopted. Id. at 413. The court then looked to the nature of the remedy available for a CERCLA contribution claim, specifically noting the statute's repeated references to the use of equitable factors to determine the amount of contribution. Id. at 414, citing 42 U.S.C. § 9613(f)(1). These references to equitable factors indicate "that the statutory action for contribution is to be a flexible remedy that may be based on circumstances not cognizable in nor readily adaptable to an action at law." Id. As such, the court concluded that "an action for contribution [under CERCLA] is essentially equitable" and therefore not entitled to a jury trial. Id.

Hatco is dispositive here on the plaintiff's right to a jury trial on its HSCA claims. The provisions of CERCLA at issue in Hatco are substantively identical to the provisions of HSCA at issue here.⁶ Like the CERCLA claims in Hatco, the HSCA claims

⁶The response cost provision of CERCLA at issue in Hatco allows recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." CERCLA § 9607(a)(4)(B). The response cost provision of HSCA at issue here allows "other reasonable and

here would have been considered equitable, not legal claims, at the time the Seventh Amendment was adopted, and the remedies available under these provisions are restitutionary and equitable in nature. Hatco, 59 F.3d at 411, 414. Accordingly, the plaintiff's HSCA claims are not entitled to a jury trial.

II. The Right to a Jury Trial Under the Pennsylvania Storage Tank Act

The Pennsylvania Storage Tank Act was enacted to prevent contamination of Pennsylvania's land and water by "releases and ruptures of regulated substances from both active and abandoned storage tanks." 35 P.S. § 6021.102. The Pennsylvania Supreme Court has interpreted the Act as providing a private right of action to enforce its provisions. Centolanza v. Lehigh Valley Dairies, Inc., 540 Pa. 398, 658 A.2d 336 (1995). Unlike both CERCLA and HSCA, the Storage Tank Act allows recovery of both response costs and compensatory damages for property damage. The Centolanza court expressly considered the damages

necessary or appropriate costs of response incurred by any other person." HSCA § 6020.702(a)(3). CERCLA's contribution provision, § 9613(f), provides "[a]ny person may seek contribution from any other person who is liable or potentially liable" for CERCLA liability, and that a court "may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." HSCA's contribution provision provides "[a] person may seek contribution from a responsible person" and "[i]n determining allocation under this section, the court . . . may use such equitable factors as it deems appropriate." 35 P.S. § 6020.705(a),(b).

available to private parties under the Act and held "a private cause of action may be brought to collect costs for cleanup and diminution in property value." Id., 540 Pa. at 407, 658 A.2d at 340. The plaintiff's Storage Tank Act claim here requests damages for both response costs and loss of property value. Second Amended Complaint (Docket No. 99) pp. 21-22.

The Storage Tank Act itself does not resolve the issue of whether the plaintiff is entitled to a trial by jury. Neither the statute nor its legislative history mentions a right to a jury trial. Although one provision of the Storage Tank Act, § 6021.1305(a), provides that violations of the act can be abated "in the manner provided by law or equity for the abatement of public nuisances," this cannot be read to imply a right to a jury trial. Although the right to an action "at law" suggests the right to a jury, the U.S. Supreme Court refused to interpret similar language in 28 U.S.C. § 1983 as creating a right to a jury. City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 707-08 (1999) (holding that language providing for a federal right to seek relief through "an action at law, suit in equity or other proper proceeding for redress" did not evince legislative intent to require a jury).

As the statute does not address a plaintiff's right to a jury, the Court must reach the constitutional issue. Because the plaintiff's Storage Tank Act claims, unlike plaintiff's HSCA

claims, are entitled to compensatory damages, the Hatco case is not controlling. The Court must therefore undertake an independent Seventh Amendment analysis.

As a recent statutory creation, the Storage Tank Act was unknown at the time the Seventh Amendment was enacted. Accordingly, under the first prong of the Supreme Court's Seventh Amendment analysis, the Court must find the closest historical analogy to the Act and determine whether that analogous action was entitled to a jury trial in 1791. Wooddell, 502 U.S. at 97; Chauffeurs, 494 U.S. at 565-66.

Neither the plaintiff nor the defendants have provided any historical analysis to the Court. The Court's own historical research suggests that the best analogy for a Storage Tank Act claim is the 18th century action for nuisance. The Storage Tank Act itself appears to support this analogy, providing that violations of its terms shall constitute a public nuisance and that any violation "shall be abatable in the manner provided for the abatement of public nuisances." 35 P.S. §§ 6021.1304-05.

Like the Storage Tank Act, the historical action for nuisance allowed a plaintiff to both abate the nuisance and recover compensatory damages.⁷ William Blackstone, 3

⁷In 18th century England, a private party faced with a nuisance had a choice of suing in law on an action on the case for damages, or abating the nuisance itself. Blackstone, 3 Commentaries, Ch. 13 at 220. Where a party abated the nuisance itself, however, it could not recover the cost of abatement from

Commentaries on the Laws of England, Ch. 13 at 210 (1765-69), available at <http://www.yale.edu/lawweb/avalon/blackstone/blacksto.htm>. According to Blackstone, an action for nuisance was an action at law specifically entitled to a jury. Id., Ch. 13 at 221; see also City of Monterey, 526 U.S. at 726 n.1 (Scalia, J., concurring) (discussing historical treatment of nuisance as an action at law entitled to a jury).

The second prong of the Supreme Court's Seventh Amendment analysis requires an examination of the remedy sought to determine whether it is legal or equitable in nature. Wooddell, 502 U.S. at 97. Here, the remedies available for a violation of the Storage Tank Act also suggest finding a right to a jury under the Act.

Under Centolanza, the Storage Tank Act allows recovery of both "costs for cleanup and diminution in property value."

the party that created the nuisance. Id. To prevent the inequities of this situation, English law had available a separate legal action for nuisance which would allow both the abatement of the nuisance and the recovery of damages. The action for nuisance was a legal writ "commanding the sheriff to summon an assise, that is, a jury, and view the premises, and have them at the next commission of assises, that justice might be done therein: and if the assise is found for the plaintiff, he shall have judgment of two things; 1. To have the nuisance abated and 2. To recover damages." Id. Ch. 13 at 221 (spelling altered to contemporary usage). Blackstone notes that the action of nuisance was, at the time he wrote in the 1760s, falling into disuse in favor of an action on the case for damages, but remained available as an "old but sure remed[y]" where "a man has a very obstinate as well as an ill-natured neighbour; who had rather continue to pay damages, than remove his nuisance." Id. (spelling altered to contemporary usage).

Id., 540 Pa. at 407, 658 A.2d at 340. Although response costs are rightly considered restitutional and therefore equitable in nature, see Hatco, 59 F.3d at 412, the "diminution in property value" allowed under Centolanza is a legal remedy. Compensatory money damages, like that for property damage, are historically legal relief. City of Monterey, 526 U.S. at 710; Feltner, 494 U.S. at 352. Although there is an exception where monetary relief is "incidental to or entwined with" equitable relief, that exception would not seem to be applicable here. For the exception to apply, the monetary relief must be an adjunct to an essentially equitable power. Chauffeurs, 494 U.S. at 571. Here under the Storage Tank Act, the award of compensatory damages for property damage is not dependant upon a claim for equitable relief for restitution of response costs.

As the remedy sought by the plaintiff under his Storage Tank Act claim seeks both restitutionary response costs and compensatory damages for loss of property, the plaintiff's claim is seeking legal, not equitable relief. The plaintiff, therefore, is entitled to a jury on his claims.

III. The Right to a Jury Trial for the Counterclaim for Contribution under CERCLA and HSCA and for "Common Law Contribution"

The Fifth and Mitchell defendants have filed a two-count counterclaim against plaintiff Woll seeking "Contribution under CERCLA and HSCA" and "Common Law Contribution." Answer and Affirmative Defenses of Fifth and Mitchell Defendants (Docket No. 50) at 21-22. This counter-claim is not entitled to a jury trial. As discussed above, under Hatco, neither CERCLA nor HSCA contribution claims are entitled to a jury.

In reaching this conclusion, the Hatco court also considered whether "a common-law remedy of contribution existed" and whether it was entitled to a jury. Id. at 412-13. The court concluded that, at the time the Seventh Amendment was enacted, an action for contribution was equitable, not legal, and that "enforcement of contribution claims by suits at law did not appear until early in the nineteenth century." Id. at 413 (citation omitted). The court also noted that the remedy of contribution was, in essence an equitable one: "[T]he right of contribution from others is grounded in equity." Id., quoting Pacific Indem. Co. v. Linn, 766 F.2d 754, 769 (3d Cir. 1985). As it seeks an essentially equitable remedy, the defendants' common law contribution claim is not entitled to a jury under the Seventh Amendment.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

F.P. WOLL & CO.,	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
FIFTH AND MITCHELL STREET,	:	
CORP., et al.,	:	
Defendants	:	NO. 96-5973

ORDER

AND NOW, this 1st day of July, 2005, upon consideration of the arguments presented in the Trial Brief of Defendant Eaton Laboratories, Inc. regarding Plaintiff's Right to Jury Trial (Docket No. 284); the plaintiff's opposition thereto (Docket No. 288), and additional briefing by all defendants (Docket Nos. 289 and 291), IT IS HEREBY ORDERED that the defendants' request to strike the plaintiff's jury demand is GRANTED IN PART and the plaintiff's request for a jury trial on its claims under the Pennsylvania Hazardous Sites Clean-Up Act, 35 P.S. §6020.101 et seq., is STRICKEN. Defendants' request is DENIED to the extent it seeks to strike the plaintiff's request for a jury trial for its claims under the Pennsylvania Storage Tank and Spill Prevention Act, 35 P.S. §6021.101 et seq.

BY THE COURT:

/s/ Mary A. McLaughlin
MARY A. McLAUGHLIN, J.